Supreme Court, U.S.
FILED
(10)
961321 MAR 21 1997
OFFICE OF THE CLERK

No. 96-

In The
Supreme Court of the United States
October Term, 1996

BROWN UNIVERSITY, *et al.*,

Petitioners,

v.

AMY COHEN, *et al.*,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE AMERICAN BASEBALL COACHES ASSOCIATION, COLLEGE GYMNASTICS ASSOCIATION, COLLEGE SWIMMING COACHING ASSOCIATION OF AMERICA, NATIONAL WRESTLING COACHES ASSOCIATION, UNITED STATES LACROSSE COACHES ASSOCIATION AND UNITED STATES WATER POLO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard A. Epstein
1111 E. 60th St.
Chicago, IL 60637
(773) 702-9563

Counsel for Amici Curiae
*Counsel of Record

Todd S. Brilliant*
Stephen S. Ostrach
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

25 pp

QUESTION PRESENTED

1. Whether the Department of Education has exceeded its statutory and regulatory authority in propounding a Policy Interpretation of Section 1681 of Title IX of the Civil Rights Act that requires that male and female athletes be represented in intercollegiate athletic programs in "numbers substantially proportionate to their respective enrollments?"

TABLE OF CONTENTS

INTEREST OF AMICI 2

STATEMENT OF THE CASE 3

BACKGROUND STATEMENT OF CONCERN 3

ARGUMENT 9

I. TITLE IX IS DRAFTED TO ADVANCE THE PRINCIPLE OF EQUAL OPPORTUNITY BETWEEN MEN AND WOMEN, WITHOUT PREFERENTIAL TREATMENT FOR EITHER. 9

II. THE DEPARTMENT OF EDUCATION EXCEEDED ITS STATUTORY AUTHORIZATION IN PROMULGATING ITS 1979 POLICY INTERPRETATION. 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Adarand Constr. Inc. v. Pena, 515 U.S. ___,
115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) 19

Cohen v. Brown University,
101 F.3d 155 (1st Cir. 1996) 3, 16, 17

Drake v. Honeywell, Inc.,
797 F.2d 603 (8th Cir. 1986) 15

EEOC v. Sears, Roebuck & Co.,
839 F.2d 302 (7th Cir. 1988) 16

Griggs v. Duke Power, 401 U.S. 424 (1971) 15

Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642 (1989) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. XIV 19

STATUTES

20 U.S.C.A. § 1681 ..... *passim*

REGULATIONS

24 C.F.R. § 106.41. ..... 12 n.1, 13

44 Fed. Reg. at 71,418 ..... *passim*

LEGISLATIVE HISTORY

118 Cong. Rec. 5808 9

RULES

Supreme Court Rule 37 3

OTHER AUTHORITIES

National Collegiate Athletic Association,
PARTICIPATION STATISTICS REPORT 1982-95 4-5

No. 96 -

In The
Supreme Court of the United States
October Term, 1996

BROWN UNIVERSITY, *et al.*,

Petitioners,

v.

AMY COHEN, *et al.*,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE AMERICAN BASEBALL COACHES ASSOCIATION, COLLEGE GYMNASTICS ASSOCIATION, COLLEGE SWIMMING COACHING ASSOCIATION OF AMERICA, NATIONAL WRESTLING COACHES ASSOCIATION, UNITED STATES LACROSSE COACHES ASSOCIATION AND UNITED STATES WATER POLO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

INTEREST OF AMICI

This brief is submitted on behalf of six organizations (collectively "Amici" or "Amici Curiae"). Unless reversed, the U.S. Court of Appeals for the First Circuit's decision in this case will adversely impact the interests that each organization seeks to promote.

The American Baseball Coaches Association ("ABCA") is a tax-exempt unincorporated association with 5800 members. It represents active coaches, former coaches and other individuals who are actively engaged in promoting baseball. Among its objectives are to promote excellence in the coaching of baseball, to promote the game of baseball, and to promote and develop leadership in baseball, especially within educational institutions.

The College Gymnastics Association ("CGA") is a non-profit association composed of 30 active and 74 association members. It represents active and retired coaches, as well as, officials and administrators. Its mission is to train and coach student-athletes in American colleges to compete in men's gymnastics competitions, including NCAA championships.

The College Swimming Coaches Association of America ("CSCAA") represents men's and women's collegiate swimming coaches at the junior college, NCAA Division I, II and III, and NAI level. CSCAA has 890 members.

The National Wrestling Coaches Association ("NWCA") is a national organization of amateur wrestling coaches and officials. Its 1700 members coach wrestlers in junior high school, high school and college. The NWCA's purpose, in part, is to sponsor competitions, recognize achievement and foster the sportsmanship and integrity that are the cornerstone of athletic competition.

United States Lacrosse Coaches Association ("USLCA") represents all male lacrosse coaches throughout the United States. Its 1113 members coach lacrosse at all levels of

competition. The USLCA's purpose, in part, is to conduct clinics, recognize achievement and promote lacrosse.

United States Water Polo ("USWP") is the national governing organization for water polo in the United States. It is recognized by the United States Olympic Committee. USWP's mission is to promote the sport of water polo in the United States and it represents approximately 20,000 members including collegiate coaches.

Unless reversed, many members of ABCA, CGA, CSCAA, NWCA, USLCA and USWP will be adversely affected by the decision of the U.S. Court of Appeals for the First Circuit here. Thus, amici are concerned with the key issue in this case: the scope of compliance with Title IX.

Pursuant to Supreme Court Rule 37.3, counsel for Amici, who are employed by the New England Legal Foundation, have obtained written consent for the filing of this brief from counsel for Petitioner and Respondent. The consents are submitted with this brief.

STATEMENT OF THE CASE

Amici accept and adopt the Petitioner Brown University's Statement of the Case.

BACKGROUND STATEMENT OF CONCERN

The social and emotional importance of the issues raised in Brown University's petition for certiorari are virtually self-evident. As the court below noted, "HEW apparently received an unprecedented 9,700 comments on the Proposed Title IX athletics regulations, prompting Secretary Caspar Weinberger to remark, "'I had not realized until the comment period that athletics is the single most important thing in the United States.'" *Cohen v. Brown University*, 101 F.3d 155, 165 n.6 (1st Cir. 1996). That statement may be something of an

exaggeration, but not by much. The problems that have arisen from the implementation of Title IX touch on issues that relate to the fundamental distribution of legislative power within the modern administrative state. By its aggressive and novel reading of the Act, 20 U.S.C. § 1681, and of the regulations under it, the Department of Education ("DED"), which took over enforcement of Title IX from HEW, has taken onto itself the constitutional functions of both Houses of Congress, and has enacted, under the guise of "interpretation," a new law that contradicts the language and purpose of the original 1972 Act. This Court should intervene in order to undo that arrogation of power and to return the power of legislation to Congress, where it belongs.

The facts and circumstances of this case have been set out with sufficient fullness in Brown University's petition for certiorari so that there is no reason to repeat them here. But it is important to recognize that the issues that have taken their toll on Brown University exert their influence on every university and college that fields intercollegiate teams. The implementation of Title IX was intended to insure equal chances for women and men to participate in intercollegiate athletics, but, as interpreted, its primary effect has been to reduce the effective participation of men. Since the passage of Title IX the number of men who participate in varsity sports at the high school level has remained roughly constant. But the number of programs available to men at the intercollegiate varsity level has declined. A few before-and-after statistics give a picture of the general story.

The National Federation of State High School Associations reports that in 1982 track and field programs were run by 14,405 high schools. *See* National Collegiate Athletic Association, PARTICIPATION STATISTICS REPORT 1982-95 at 131. In that same year, 577 out of 788 NCAA institutions sported intercollegiate track and field teams, a 73.2 percent participation level. *Id.* at 74. In 1995, 14,192 high schools

provided track and field programs but the percentage of NCAA institutions dipped to 65.1 percent, as only 588 out of 903 NCAA institutions had track and field programs. *Id.* at 74, 131. In 1982, 8,512 high schools had wrestling programs. *Id.* at 132. In that same year 363 of 788, or 46.1 percent of NCAA schools had intercollegiate wrestling programs. *Id.* at 80. In 1995, 8,538 high schools ran wrestling programs nationally, but the number of NCAA programs dipped to 257 out of 903 NCAA institutions, or 28.5 percent. *Id.* at 80, 132. In swimming, the relevant figures for 1982 had 3,757 high school varsity programs, with 377 swim programs for 788 NCAA institutions, a 47.8 percentage. *Id.* at 68, 130. The numbers for 1995 show 4,595 high school programs, but only 368 swim programs out of 903 NCAA institutions, for a figure of 40.8 percent. *Id.*

In all three of these sports, a constant level of high school sponsorship nationally from 1982-95 is followed by a significant percentage drop in the number of NCAA institutions sponsoring these sports. When collegiate institutions at all levels are taken into account the drop becomes still more dramatic. The NCAA, the National Junior College Athletic Association and the National Athletic Intercollegiate Association listed a total of 777 wrestling programs in 1972, but by 1996 that total dwindled to 325. The pursuit of group parity has lead to many needless individual sacrifices.

These declines in male participation cannot be attributed to any lack of interest on the part of male students. Nor in most cases can they be attributed to a growth in opportunities for women athletes. The present Policy Statement only looks at the number of male and female students participating in intercollegiate athletics. It takes no account of the number of positions that are presently open and authorized for male and female athletes, for the additional cost to bring a student on the varsity team, or of the ability of the sport to generate the revenue -- be it from ticket sales, donations or other sources -- needed to cover its expenses. These simple omissions lead to

some striking anomalies. According to NCAA participation statistics, the average size of a 1995 men's baseball squad is 29.7 players. But the average size of a women's softball team is only 17.1 players. The Policy Statement's crude, paint-by-numbers approach treats this situation as though it generates a shortfall of 12 women players that must somehow be made up. It does not matter for these purposes how many additional unfilled spots are available on the women's softball team; nor does it matter that large numbers of male student athletes must be turned away, even if they do not receive any scholarship support, or even make the traveling squad. Nor does it make a difference that huge scholarships are used to coax female students to participate in athletics, while male athletes beg to participate as walk-ons. All that matters under the Policy Interpretation is the wrong bottom line, not the social preferences or processes that lead to them. The only way that the baseball team can accept more members is to beg the softball team to do the same. Two programs that should be independent and self-sufficient are yoked by the law into one. So long as not "enough" women do not wish to play, some men will be barred from playing.

To give another illustration of how skewed matters have become under the present Policy Interpretation, consider the State University of New York in Albany, a Division III school, which offers no athletic scholarships, where all athletes simply participate out of their love for the sport. A few years ago, 14 women tried out for the softball team, two of whom subsequently quit the squad. Over 70 men tried out for the baseball team, but only 32 made the team. Under the current accounting, the numerical imbalance meant that 20 hypothetical women were treated as though they were denied opportunities that were theirs for the asking. Yet by the same token the nearly 40 men who could not participate on the male team were treated as invisible creatures whose interests vanish under the interpretative rules of the Department of Education.

These skewed figures should not come as a surprise to anyone who looks at the relationship between college and high school athletics. The basic pool of varsity athletes at the college level is drawn from the pool of high school athletes. Even with the large increase of female high school athletes since the passage of Title IX, at the high school level today male athletes outnumber female athletes by 64 to 36 percent. But no effort is made under the law to normalize the required levels of participation at the college ranks to take into account the major differences in the pool of men and women athletes. Of course, Amici do not argue that this ratio is immutable, for it has clearly changed over the years. But by the same token, no one should assume that women are so passive, and universities are so unresponsive that any increase in participation will only come from federal enforcement efforts. The women students who attend our colleges and universities are part of this nation's educational elite. They will become physicians, professors, administrators and, yes, even lawyers. They will excel in business and the arts. They will marry and raise families. They will participate in the political life of our nation. They are as fully capable as their male counterparts of making their own choices of extra curricular activities, in voicing their desires to university administrators, and in taking the initiative in organizing their participation in varsity athletics. It should not be assumed that those women who choose not to participate in intercollegiate sports are in the grip of some false consciousness, or squander away their time in frustration or idleness. The obvious assumption is that they will participate in higher levels than men in other campus activities from journalism to political organization.

Unfortunately, harmful effects follow from the assumption that differential levels of participation must be, always and solely, the product of illicit discrimination. Authorized but unused places are now totally ignored in making any overall determination of athletic opportunities. Since both

input and interest levels are skewed by circumstances outside the control of universities and colleges, draconian measures have to be taken to bring all programs back into compliance with external norms that make little programmatic sense. New women's teams may be added in sports like golf and cross-country, but analogous programs will not be instituted for men, lest the original imbalance be preserved. It matters not that a male team for 20 could be added for $10,000, while a female team for 10 costs twice as much. Or, when the budgetary pressures become severe, universities will limit male participation, no matter how little it saves because they cannot afford to incur the heavy costs to bring a new competitive women's varsity team on line. Title IX, which heralds increased participation of university women in college level varsity sports ends up as a victim to the law of unintended consequences. Female participation does not increase, but male participation declines. The number of excluded female athletes is small, or zero; the number of excluded male athletes soars. Congress did not intend for Title IX to level participation in intercollegiate activities downward.

Yet none of this has to be. Universities are able to manage their athletic programs within the original equal opportunity constraints of Title IX. But they should not be forced to negotiate the obstacles to sensible athletic programs that have been erected, as will now be shown, by the unauthorized expansion of Title IX through the Department of Education's 1979 final Policy Interpretation.

ARGUMENT

I. TITLE IX IS DRAFTED TO ADVANCE THE PRINCIPLE OF EQUAL OPPORTUNITY BETWEEN MEN AND WOMEN, WITHOUT PREFERENTIAL TREATMENT FOR EITHER.

In 1972, Congress passed Title IX of the Civil Rights Act which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a) (West 1997). The focus of this Section was on the individual person, and, as applied to universities, was designed to make sure that each individual as an individual had an equal opportunity to participate in all programs or activities, including physical education. The purpose of this Section was corrective, that is, to eliminate the forms of discrimination that might have been in place in higher education prior to the date of passage. As stated by Senator Bayh, the purpose of Title IX was to "[p]rovide for the women of America something that is rightfully theirs -- an *equal chance* to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972) (emphasis added). Most emphatically, the purpose of Title IX was not to create or foster new forms of discrimination by administrative action.

Any doubts on the scope of the general language of Section 1681(a) are removed when it is read in conjunction with Section 1681(b), which states that "nothing" in Section 1681(a) "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist" between the

total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C.A. § 1681(b) (West 1997). The only offset to this provision is also found in Subsection (b) insofar as it states that it "shall not be construed to prevent the consideration in any . . . proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

The clear import of these sections taken together is that Congress did not wish for the ending of one form of discrimination to lead to the rise of a second form of discrimination that could be, both in its intention and effect, more invidious and pervasive than the purported discrimination that it displaces. Yet by the same token, it realized that proof of discrimination in some cases could be difficult to achieve, and thus it allowed the use of statistical evidence to show a numerical imbalance.

But it is equally clear what this Section did not do. It did not treat any numerical imbalance based on crude participation rates as proof of discrimination under Section 1681(a); normal statistical techniques require all sorts of adjustments be made to raw data in order to make sound comparisons, *see infra* at 15-17. Nor did Section 1681(a) say that any differential levels of participation in intercollegiate sports constitutes a presumptive violation of the law that is excused by showing preferential treatment in favor of women athletes as the "underrepresented sex" -- a term that is nowhere found in Title IX itself. Rather the basic command of Section 1681(a) still stands as written. That command is still complemented by the prohibition against preferential treatment. Indeed under Section 1681(b) statistical evidence should be used as much to show the preferential or disparate treatment

forbidden under Title IX. It could, for example, be used to show discrimination against male athletes by the refusal of DED to measure participation levels as against potential participants instead of the entire student body. And at no point does Title IX show anything other than even-handed treatment for men and women, or require that the next generation of male athletes be placed at a legal disadvantage, even if an earlier generation of male athletes benefitted from practices now prohibited by law. In short, Section 1681 did not authorize disparate treatment of men *or* women athletes. It prohibited any favoritism, in either direction.

II. THE DEPARTMENT OF EDUCATION EXCEEDED ITS STATUTORY AUTHORIZATION IN PROMULGATING ITS 1979 POLICY INTERPRETATION.

Title IX represents a delicate Congressional compromise between the commands of the antidiscrimination law and the autonomy and academic freedom of the universities that fall under its scope. That compromise is not perfect or ideal, and is frayed around the edges. Congress, if it so chose, could modify the provisions of Title IX in order to adjust the burdens of proof and the types of evidence used to prove discrimination. But OCR is kept on a short leash under Section 1681(b). It is charged with the implementation of the statute, not with its amendment. Its powers are hemmed in by the explicit requirement that the statute shall "not be interpreted" to require either preferences or disparate treatment. An acceptable system of regulations has to respect all portions of the basic statute, and cannot pick and choose among its commands, more or less at will. But in this case, the HEW strayed from its mandate with its 1974 regulations, and DED flatly contravened it with its 1979 final Policy Interpretation.

The OCR's regulations address the level of support available for students engaged in "interscholastic,

intercollegiate, club or intramural athletics."[1] But these regulations do not hone in on the central question posed by a statutory requirement of equal opportunity: whether members of one sex have been denied opportunities that have been given to members of the other sex. The best way to examine that question is to ask whether any individuals have been excluded from activities in which they want to participate. To the extent that the percentages of excluded males and females are equal, then equal opportunity for members of both sexes has been afforded. Colleges, of course, have budgetary and space limitations and therefore full opportunities cannot be supplied to members of either sex. Yet the closest that the regulations come to posing the central question is found in Section (c)(1) which simply asks: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," without indicating by what

---

1. Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation for coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity

24 C.F.R. § 106.41 (c).

standards the university programs will be judged.

The 1979 final Policy Interpretation sought to fill the gap left in the 1974 regulations. Its relevant passages read as follows:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418.

This final "policy interpretation" represents a sharp and unauthorized break from the language and scope of both Title IX and the 1974 regulations. Note the contrasts. The 1974 regulations apply to all "interscholastic, intercollegiate, club or intramural activities." 24 C.F.R. § 106.41(c). The Policy Interpretation applies only to intercollegiate athletics. The 1974 regulation demanded only that "the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* The Policy Interpretation requires an effective accommodation solely for members of the "underrepresented gender," an ill-disguised

reference to women in virtually all cases. Where the regulation speaks in terms of equal opportunities, the Policy Statement speaks in terms of equal results, regardless of the level of interests and capabilities that male and female students bring to athletics.

This Policy Interpretation is more accurately styled a Policy Revolution, so great is its deviation from Congress's stated intentions. If the standards articulated in this Policy Interpretation were applied to all programs and activities covered by Title IX, then every university in the land would be in massive noncompliance with the law, not only in athletics but everywhere else. In the context of academic programs, Title IX would be read to require a rough proportion of men and women in engineering and science on the one hand, and art and literature on the other, even though most certainly far more men are engaged in the former activities, and far more women students are engaged in the later. Yet it is easy to imagine the public outcry. Thus if an engineering program enrolled 80 men and 20 women, the only choices open to the school would be to exclude 60 men, to find 60 additional women to enroll in the program, or some combination of the above. The same result would apply in reverse in literature. The quest for equal opportunity would turn into a full-scale expedition to find less qualified and less interested men and women, to fill valuable seats that they do not want so that interested men and women could fulfill their own career ambitions -- albeit in an educational environment far less conducive to productive study. It is hard to believe that any conception of equal opportunity requires this unannounced social transformation. But the logic of the Policy Interpretation leaves no viable intellectual alternative. And it is all in the name of equal educational opportunity.

The Policy Interpretation is no less revolutionary in its consequences even if it is confined solely to student athletics. The 1974 regulations apply not only to intercollegiate sports;

they also apply to all interscholastic, club and intramural programs. Typically, these programs are open to men and women in proportion to the numbers who sign up to participate, which results in greater levels of disparity in many sports than are found on intercollegiate teams. If the Policy Interpretation were extended to these activities, then most, if not all, collegiate intramural programs in the United States are in violation of the statute. So startling a policy change should be implemented by Congress, if it is to be implemented at all. It should not be smuggled into the law by a Policy Interpretation that has never been subject to Congressional examination or approval. Nor should it be accorded any special presumption of legitimacy under the law. *See, e.g., Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986).

Simply stated, the Congressional desire to create equal opportunity meant an elimination of biases that existed prior to the passage of the statute. At no point did Title IX embrace the punitive philosophy that two wrongs make a right. It did not command that men should have fewer opportunities to engage in sports after the passage of Title IX because they -- that is, other men -- had more opportunities before. Rather Title IX was designed to be sure that equal opportunity did not become a requirement for equal results or for the backdoor invocation of preferential treatment. Lamentably the "substantially proportionate" requirements found in paragraph (1) of the Policy Interpretation require just what the language of Title IX expressly forbids.

Indeed the interpretation that the DED has attached to its own regulations is far more extravagant than other government efforts to use "effects" tests. The decision in *Griggs v. Duke Power*, 401 U.S. 424 (1971) introduced disparate impact into Title VII of the Civil Rights Act governing employment relations. Yet this Court itself recognized the excesses of *Griggs* as a matter of statutory interpretation when it cut back on the decision in *Wards Cove*

Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). But even in the heyday of *Griggs*, the application of that disparate impact test did not rest on any crude measure of the number of black and white individuals within any community. Rather it depended on sophisticated efforts to determine by geography and training, which individuals fall within an "availability pool" and which do not, as *Wards Cove* itself recognized. And courts have allowed defendants charged with sex discrimination in employment under a disparate impact theory to show the differential levels of interest that men and women have in certain positions. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

This same sophisticated approach could, and should be carried over to any statistical analysis conducted under Section 1681(b), with an eye to determining how many men and women are interested in participation in various varsity programs. The precise estimates are of course subject to honest dispute in many cases, but the one statistical technique that is certain to be wrong is that which makes no correction from the base number of enrolled students. Yet that is precisely the approach taken in the Policy Interpretation.

Note the evidence that has been omitted. It is well known that levels of participation in varsity athletics at the College level are influenced by the level of participation in College sports at the high school level. It is also known that male participation in high school is far greater than female participation. Similarly, the regulations under Section 1681 recognize that only men participate in certain contact sports, such as, wrestling or boxing. Yet the Policy Interpretation ignores what the regulations recognize: no adjustment is made in the overall proportionality requirements to take into account the low level of demand that women athletes have for certain contact sports, even though that is a key component of overall demand for sports. *See Cohen*, 101 F.3d at 192-93 (Torruella, C.J., dissenting). It is also well apparent that even when

positions are authorized for men and women athletes, fewer vacancies arise in the male programs than in the female programs. Yet the Policy Interpretation makes no effort to take into account the number of unused slots to determine whether male and female athletes have equal chances at participation. Rather, the Policy Interpretation assumes without explanation that opportunities that have not been used are opportunities that have not been offered. In so doing, the Policy Interpretation leaves colleges desperately trying to induce uninterested women to participate in sports, not so that they will benefit, but so that the number of willing and eager male athletes that can be accommodated into the program increases.

The Policy Interpretation marks a revolution in the governmental control of college programs. The whole emphasis of Title IX is to expand the number of opportunities that are available to individuals of both sexes. The dominant effect of the Policy Interpretation is to reduce the number of athletes who will participate in intercollegiate athletics. Taken at face value, any university or college can comply with the Policy Interpretation by shutting down all of its athletic programs. Under DED's substantially proportionate test, *no* opportunities for either sex satisfy to the letter the most stringent reading of the equal opportunity command, even if it defeats the original legislative intention.

It will, of course, be said in reply, that no school would dare shut down its programs for male athletes, so that in practice compliance with the statute will lead to a higher level of participation for female athletes even if it does not lead to a higher number of male athletes. But the numbers at Brown tell a different story. "During the 1990-91 academic year, Brown fielded 16 men's and 15 women's varsity teams on which 566 men and 328 women participated. By the 1993-94 year, there were 12 university-funded men's teams and 13 university funded women's teams. These teams included 479 men and 312 women." *Cohen*, 101 F.3d at 192 (Torruella, C.J., dissenting).

All this litigation has left fewer women and many fewer men participating in intercollegiate athletics. That result should offer no comfort to those who attribute only benign consequences to the Policy Interpretation. The addition of new teams costs money, money which is not available in the age of budget deficits. Yet parity between the sexes can be restored, at budgetary savings, only by cutting men's teams and not by cutting women's teams. That logic applies even if the identical amount of spending would have allowed either 50 men or 10 women to compete, but not both. Congress clearly preferred to expand total opportunities. The Policy Interpretation creates powerful incentives for universities to contract them. In addition, the lesson of this case is never add a women's team on an experimental basis because it will be impossible to cut it later without gut-wrenching litigation. In the world of the Policy Interpretation all experiments succeed so long as they increase the short-term participation of women athletes. The entire system of proportionate representation in intercollegiate athletic programs thus pits male athletes against female athletes, and does nothing to advance the sensible management of any athletic program.

Yet it will be said that the Policy Interpretation is not that rigid because it contains two savings clauses which allow those universities that do not meet the substantially proportionate test to show that they are well along the way. But neither of these saving clauses remedies the incurable defect of the basic numerical standard. Proportionate representation is utterly inconsistent with the demands for equal opportunity. If so, then it is wholly improper for the DED to defy the will of Congress by treating universities as though they were in compliance with Title IX only if they pursue an end that is inconsistent with the basic statutory command. Yet that is exactly what the second prong of the Policy Interpretation does.

More specifically, part (2) offers protection only for those programs that show continuing expansion for the

underrepresented sex. There is no correction here for levels of interest. And the Section unwittingly encourages universities like Brown to go slow with their expansion so that they can continue to improve their ratio, here by denying today's women the opportunity to participate in programs that would, in the absence of the Policy Interpretation, be promptly implemented. Nor does part (3) provide any relaxation from the presumptive quota provision because it looks only at the "interests and ability" of the underrepresented sex and attaches no weight to the claims of members of the other sex for participation in the program.

The Policy Interpretation represents a radical repudiation of Congress's original program. The obstacles it imposes on male athletes is in clear violation of the basic principle of equal opportunity that each person should count for one and only for one. From behind the fig-leaf of "underrepresented sex" the Policy Interpretation engages in the very form of preferential treatment that Title IX itself prohibits. This interpretation flouts the desires of Congress and it opens up the serious question of whether it authorizes a form of covert sex discrimination that is in violation of the equal protection clause. *See* U.S. CONST., amend. XIV; *Adarand Constr. Inc. v. Pena*, 515 U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). But there is no need to face these difficult questions since the DED has so clearly overstepped the limits of its Congressional mandate. A statute that was designed to secure equal opportunity for all persons has now been construed to require preferential treatment for women over men. Congress never authorized that result. This Court should grant certiorari in this case to see that DED steers the statutory course, not its own.

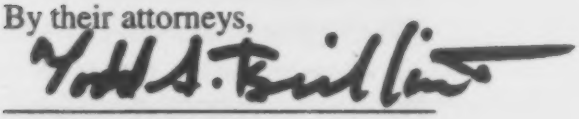
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari and, after hearing the case, reverse the decision of the U.S Court of Appeals for the First Circuit that Brown University is in violation of Title IX.

Respectfully submitted,

American Baseball Coaches Association, College Gymnastics Association, College Swimming Coaches Association of America, National Wrestling Coaches Association, United States Lacrosse Coaches Association and United States Water Polo

By their attorneys,



Richard A. Epstein
1111 E. 60th St.
Chicago, IL 60637
(773) 702-9563

Counsel for Amici Curiae
*Counsel of Record

Todd S. Brilliant*
Stephen S. Ostrach
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

DATED: Boston, Massachusetts: March 19, 1997